

Gen. Op. No. 11-II801

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February 14, 2011

Mayor John F. Klingmeyer
City of New Castle
220 Delaware Street
New Castle, DE 19720

**RE: Freedom of Information Act Complaint
Against City of New Castle**

Dear Mayor Klingmeyer:

By letter of January 11, 2010 to the Attorney General, you made a complaint pursuant to the Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA"), against the City of New Castle concerning several issues surrounding the selection of a new City Solicitor. On January 24, 2011, you telephoned me and refined your concerns to three issues. The first issue is whether the agenda for the meeting of December 14, 2010 adequately described the purpose of the proposed executive session; the second issue is whether the procedures for selecting a City Solicitor were properly discussed in executive session, or should have been considered at a public meeting; the third issue is whether FOIA was violated when the executive session was held before the time the public meeting was scheduled to begin. The City made a timely response to your complaint. This is the Department of Justice's determination of your complaint, pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

A regular monthly meeting of the New Castle City Council was noticed to begin at 7:00 p.m. on December 14, 2010, and the agenda included "An Executive Session to discuss a personnel matter." The agenda also gave notice that a public hearing on a proposed amendment of the City's zoning map would take place at 6:00 p.m., before the regular monthly City Council meeting. As it turned out, the public hearing ended well before the time for the regular meeting to begin, and at 6:35 p.m., before the public hearing was adjourned, the City Council voted to go into executive session.

During the executive session, the council discussed an employee disciplinary matter. Council President then reported to Council that he and the City Administrator had pre-screened three suitable candidates for City Solicitor position and revealed those candidates' names. Candidates' resumes were distributed, but no substantive discussion of the candidates' qualifications occurred. Council President then mentioned that the selection process would include interviews of the candidates before the full Council and that the mayor would be asked to participate. The executive session concluded by 6:50 p.m.

RELEVANT STATUTES

The purpose of the Delaware Freedom of Information Act is to provide "citizens . . . the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy[.]"¹ 29 *Del. C.* § 10001. To accomplish those purposes, meetings of a quorum of a public

¹ While FOIA refers throughout to "citizens," restricting the rights created by FOIA to only citizens of Delaware has been held unconstitutional. *Lee v. Minner*, 458 F.3d 194 (2006).

body must be open to the public. 29 *Del. C.* § 10004(a). However, a public body can meet in executive session, closed to the public, for any one of the purposes listed in 29 *Del. C.* § 10004(b). One of those purposes is “[d]iscussion of an individual citizen’s qualifications to hold a job . . . unless the citizen requests that such meeting be open.” 29 *Del. C.* § 10004(b)(1). “Personnel matters in which the names, competency and abilities of individual employees . . . are discussed” can also be handled in executive session. 29 *Del. C.* § 10004(b)(9). A public body may go into executive session only on a vote held at a public meeting. 29 *Del. C.* § 10004(c). “The purpose of such executive session shall be set forth in the agenda,” and all voting must take place at a public meeting. *Id.*

DISCUSSION

We have repeatedly determined that, because the public is excluded from executive sessions, an agenda does not have to describe with particularity the purpose of the executive session. A brief reference to “personnel matter” is sufficient. *E.g., Op. Att’y Gen. 06-IB15*, 2006 WL 2355969, *2 (Del. A.G.).

However, after considering the personnel matter, which is permitted 29 *Del. C.* § 10004(b)(9), the executive session shifted to topics that had nothing to do with an individual employee. Had Council discussed a candidate’s job qualifications, that would have come within 29 *Del. C.* § 10004(b)(1)—“[d]iscussion of an individual citizen’s qualifications to hold a job[.]” But, the Council did not discuss any candidate’s job qualifications; the Council President revealed the names of three candidates for the City Solicitor position, distributed their resumes, and mentioned how the selection process would proceed, all of which should have occurred in a public meeting. Moreover, “the mechanics of the selection process” for a new employee cannot be discussed in executive

session. *Op. Att'y Gen 02-IB17*, 2002 WL 31031224, *7 (Del. A.G.). Therefore, everything that happened in the executive session after the personnel matter was disposed of should have taken place in the public meeting. However, the City has already remedied the violation by holding a special meeting on January 27, 2011 to repeat in public the proceedings of the December 14, 2010 executive session. There is no need for further remediation.

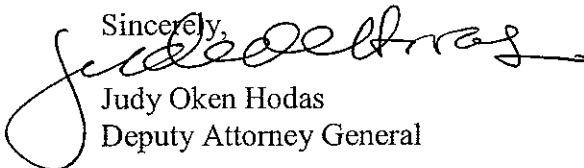
Another violation occurred when the Council, without the benefit of the advice of legal counsel, voted at the end of the 6:00 p.m. public hearing to go into executive session. FOIA is clear that the vote to go into executive session must take place at a public meeting of the public body. 29 *Del. C.* § 10004(c). A meeting is a gathering of a quorum of the members of the public body, to discuss or act on public business. 29 *Del. C.* § 10002(b). A public hearing is not necessarily a public meeting, and there is no evidence that the December 14 public hearing met the requirements of a meeting of the Council. For instance, we were not provided with minutes that show the result of the vote to go into executive session, as required by 29 *Del. C.* § 10004(c). Moreover, the agenda for the public meeting that began at 7:00 p.m included an executive session as part of that meeting, not as part of the public hearing. However, no remediation is necessary, because the entire process was repeated at the special meeting on January 27, 2011.


You brought this complaint at least in part because you missed the December 14 executive session when you did not arrive at the meeting place until the time for the 7:00 general meeting, at which point the executive session had already occurred. We have in the past expressed concern when a public body allowed "select members of the public to

attend its executive sessions[.]” *Op. Att’y Gen 02-IB17*, 2002 WL 31031224, *10 (Del. A.G.). We are concerned at Council’s including the Mayor in executive sessions. According to the City’s Charter, the mayor is the executive officer of the City, not a member of Council, as is the case in some towns. Charter of the City of New Castle, Section 10, which can be found at <http://charters.delaware.gov/new%20castle.shtml> (last visited February 8, 2011). By admitting you to executive sessions for collegial reasons, the Council might be “transform[ing] the so-called executive session into a meeting that must be open to all of the public.” *Op. Att’y Gen 02-IB17*, 2002 WL 31031224, *10 (Del. A.G.).

CONCLUSION

For the reasons stated above, the Council of the City of New Castle did not violate FOIA when the agenda of a public meeting stated that “personnel matters” would be addressed in executive session, and the Council did, in fact, address personnel matters. FOIA was violated when the executive session took place before the public meeting for which it was noticed, and when it addressed matters not permitted to be considered in executive session. However, the City has corrected those violations in a special meeting of the Council, and no further remediation is necessary.

Sincerely,

Judy Oken Hodas
Deputy Attorney General

Approved:

Lawrence W. Lewis, State Solicitor

Mayor John F. Klingmeyer

February 14, 2011

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cc: Opinion Coordinator

Daniel R. Losco, Esquire